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Richard Haymaker, Esq.
Chief Legal Counsel
Illinois Liquor Control Commission
100 West Randolph Street
Suite 7-801
Chicago, Illinois 60601

Re: Proposed Retailer Specific/Private Brand Labeling Rule

Dear Mr. Haymaker:

In accordance with the Commission's request made at its hearing held in Chicago on July 16, 2014, I am forwarding our draft of a proposed rule ("Proposed Rule") which we believe the Commission has the authority to adopt, and which specifically acknowledges the longstanding permissibility of the use of "Private Brand Labels" in full compliance with the Illinois Liquor Control Act ("Act"). At the outset, I have set forth the basis and authority pursuant to which the Commission may adopt the Proposed Rule, recognizing the permissibility of Private Brand Labels without the need for legislative action.

I. The Authority of the Commission to Adopt the Proposed Rule Confirming the Longstanding Permissibility of Private Brand Labels Under the Act.

The Illinois Legislature first passed Section 5/6-17.1 of the Act in June of 1994. At the time, Private Brand Labels (as defined and described below) had long been in use in Illinois and continue to be in use today. Since the passage of Section 5/6-17.1, the Commission has never interpreted or applied Section 5/6-17.1 to regulate, let alone prohibit, a retailer's use of Private Brand Labels which contain the retailer's brand or trade name.

The "brand or trade name" is the name under which a product is advertised, marketed, and sold. It is usually the most prominent information on the label, the name used by consumers

to identify the product, and/or the primary name differentiating that product from similar types of products. Examples of those types of labels and the prominent information include: "Cooper's Hawk Chardonnay" versus "Kendall Jackson Chardonnay," or "Kirkland Vodka" versus "Smirnoff Vodka."

Private Brand Labels contain a brand name owned by a retailer or a retailer possessing the legal right to use the brand name set forth on the labels of alcoholic beverage products. The term "Private Labels" and "Private Label Products" are also commonly used to refer to Private Brand Labels or Private Brand Label products. Examples of names owned by retailers are: "Cooper's Hawk" and "Kirkland."

In 1999, the Legislature amended Section 5/6-17.1 and changed the reference from "beer" to "alcoholic liquor." Under well-established rules of statutory construction, the Legislature is deemed to have knowledge of the manner in which the laws it enacts are interpreted. The Legislature, at the time of its 1994 amendment to Section 5/6-17.1, is deemed to have knowledge, whether actual or otherwise, that neither this Section nor any other section of the Act gave rise to a prohibition of Private Brand Labels, that they were permitted, and left their permissibility unaffected by merely changing the one word "beer" to two so as to now read "alcoholic liquor." "That the statute has remained unaltered through successive sessions of the General Assembly... indicates legislative acquiescence in the contemporary and continuous administrative interpretation." *See, People ex rel. Spiegel v. Lyons, 1 Ill.2d 409, 414 (1953).* "A reasonable construction of an ambiguous statute by the agency charged with that statute's enforcement, if contemporaneous, consistent, long continued, and in concurrence with legislative acquiescence, creates a presumption of correctness that is only slightly less persuasive than a judicial construction of the same act." *See, People ex rel. Watson v. House of Vision, 59 Ill.2d 508, 514–15 (1974)*; and, an agency may be bound by its own established custom and practice as well as by its formal regulations. *See, Briscoe v. Kusper, 435 F.2d 1046, 1055 (7th 1970)*; and *Olin Corp. v. Environmental Protection Agency, 54 Ill.App.3d 480, 485 (1977).*

The legislative history and intent as to Section 5/6-17.1, both when first adopted as well as when amended, readily disclose that Section 5/6-17-1 was only intended to mandate service by wholesalers to all retailers regardless of retailers' geographical location or the size of their operation, and not in any way to regulate Private Brand Labels. "If the legislative intent is clear, 'that is the end of the matter.'" *See, Illinois Bell Telephone Co. v. Illinois Commerce Com'n, 362 Ill.App.3d 652, 657 (2005).*

Therefore, if the Commission seeks to, in effect, now prohibit the use of Private Brand Labels by retailers based upon what would be an entirely different interpretation of the Act than the one given by the Legislature and contrary to the longstanding practice of their permitted use in Illinois by the Commission, then we believe it must do so by securing passage of specific legislation prohibiting their use. Neither the Commission nor its counsel can now seize upon the

words "each brand" contained within Section 5/6-17 or any other provision contained within the Act to contend Private Brand Labels are now prohibited or to impose strict conditions upon their use which would amount to a prohibition. However, even if one were correct to rely upon the term "each brand" and correct in applying Section 5/6-17.1 as the basis to regulate Private Brand Labels, then one cannot neglect the words "authorized to distribute" and must note that a wholesaler is not authorized by the producer to distribute Private Brand Labels generally, but rather that the distributor is only "authorized to distribute," i.e., sell only to the retailer who owns the Private Brand Labels. Therefore, Private Brand Labels do not fall within the purview, let alone any requirements of Section 5/6-17.1, to in effect allow the Commission to prohibit and/or restrict the use of Private Brand Labels.

On the other hand, if the Commission wishes to codify the permissibility of Private Brand Labels based upon their longstanding permitted use in Illinois in conformity of the Act, and acknowledge that their permissibility was not affected by either the initial passage or amendment of Section 5/6-17, then we believe that this would be the proper subject of and within the Commission's rulemaking authority. *See, Popejoy v. Zagel 115 Ill.App.3d 9, 12 (4th Dist. 1983).*

The fact that Private Brand Labels are permitted and not precluded under the Act is also supported by the plain fact that neither the Commission nor any of its prior counsel has ever used Section 5/6-17.1 or any other provision of the Act to prohibit a retailer's use of Private Brand Labels. Thus, we believe the Commission is free to adopt a rule which codifies the longstanding interpretation that Private Brand Labels are, in fact, not prohibited, but rather permitted under the Act. In this regard, below is our draft of the Proposed Rule specifically acknowledging the permissibility of Private Brand Labels.

II. Proposed Rule – Permissibility of Private Brand Labels Under the Act.

The purpose of this Rule is to make clear that the manufacture, distribution at wholesale, and sale at retail to consumers of Private Brand Labels, as identified below, are not prohibited under any provision of the Act including but not limited to Section 5/6-17.1. Private Brand Labels have long been permitted under Act and shall continue to be permitted based upon on the following terms and conditions:

1. Brand Names:

   The "brand or trade name" is the name under which the product is advertised, marketed, and sold. It is usually the most prominent information on the label, the name used by consumers to identify the product, and/or the primary name as opposed to the type of product.

2. Private Brand Labels:

   A "Private Brand Label" is a brand name owned by a licensed retailer or a retailer who has the legal right to use the brand name which is contained on the label of an alcoholic beverage product, be it a beer, wine, or spirit product. A private brand label also may be identified as a "Private Label" or "Private Label Product."

3. A Private Brand Label does not have to contain the retailer's name but the licensed retailer must own the brand name or otherwise have the legal right to use a brand or trade name belonging to another entity, which for purposes of this Rule shall also constitute the ownership of the name by a retailer.

4. An alcoholic beverage product with a Private Brand Label can only be produced or imported for the ultimate sale to a licensed retailer who possesses the rights to the Private Brand Label.

5. An alcoholic beverage product with a Private Brand Label can only be sold by the producer or importer under a limited grant of authority by the retailer to a wholesaler with limited authority to distribute and sell the Private Brand Label only to a licensed retailer who owns the Private Brand Label. Although a Private Brand Label, the name of the manufacturer or importer may also appear thereon for purposes of identifying the manufacturer, importer, or bottler as the producer of the Private Label Product as may be required under TTB regulations for the issuance of a Certificate of Label Approval ("COLA") by the TTB for that Private Brand Label product.

6. A Private Brand Label is not one where the product is produced or intended for general distribution, and offered for sale to all retailers, though the manufacturer is licensed to produce the product with the retailer's name. In this instance, the producer sells the product to a wholesaler who is authorized to sell the product to any and all retailers, unlike in the instance of a Private Brand Label which is authorized for sale only to the retailer who owns the brand name. In the instance where the brand is for general distribution, the manufacturer may pay a fee or royalty to the retailer for the right to use its name on the label. In the instance of a Private Brand Label, no fee or royalty is paid to the retailer or to the producer for the use of the retailer's name. In the instance of a Private Brand Label, the producer receives payment only from the wholesaler, consisting of the purchase price of the product, and the wholesaler receives only the purchase price from the retailer. In either instance, both types of products bearing the retailer's name are permitted under the Act.

As stated at the outset of this letter, we believe that the Commission possesses the authority to specify and/or to acknowledge the longstanding interpretation of the Act which permits and/or does not prohibit Private Brand Labels in Illinois by adoption of the Proposed Rule above.

Sincerely,

SIEGEL & MOSES, P.C.

By: _____
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